

**In The Supreme Court  
OF THE  
United States**

OCTOBER TERM, 1989

PACIFIC MUTUAL LIFE INSURANCE COMPANY,  
*Petitioner,*

*v.*

CLEOPATRA HASLIP, et al.,  
*Respondents.*

**ON WRIT OF CERTIORARI  
TO THE SUPREME COURT OF ALABAMA**

**BRIEF AMICUS CURIAE FOR  
THE HOSPITAL AUTHORITY OF GWINNETT  
COUNTY, GEORGIA  
IN SUPPORT OF THE PETITIONER**

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## QUESTIONS PRESENTED

Whether the Due Process and Equal Protection Clauses of the Fourteenth Amendment impose limitations on a jury's standardless discretion to: (1) award punitive damages in civil cases, and (2) determine the amount of such punishment?\*

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\* Pursuant to Rule 29.1 of the Rules of this Court, the following constitutes a list of all parent companies, non-wholly owned subsidiaries, and affiliates of Amicus: the Gwinnett Hospital System Foundation, Inc., and its subsidiary, Gwinnett Service Corporation, Inc.

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**BRIEF AMICUS CURIAE FOR  
THE HOSPITAL AUTHORITY OF GWINNETT  
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IN SUPPORT OF THE PETITIONER**

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**INTEREST OF THE AMICUS<sup>1</sup>**

The Amicus, the Hospital Authority of Gwinnett County, is the Petitioner for certiorari in *The Hospital Authority of Gwinnett County, Georgia v. Robert Stanford Jones, Administrator of the Estate of William Harold O'Kelley, Deceased*, No. 89-1315, now pending.

The issues to be reviewed in the instant case (No. 89-1279) are similar to and may decide issues raised by the Amicus in its case (No. 89-1315). Because Amicus may be bound by the Court's decision in this case as to some of the due process and equal protection issues Amicus has raised, it desires to be heard.<sup>2</sup>

**SUMMARY OF ARGUMENT**

In the absence of statutes specifying with particularity the conduct for which punitive damages may be awarded and limiting the amounts thereof by reference to an ascertainable standard, awards of punitive damages violate defendants' rights to due process and equal protection of the law by, *inter alia*, failing to provide advance notice of the conduct for which punitive damages may be awarded and failing to provide a rational basis upon

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<sup>1</sup> Consent from counsel for both parties has been filed with the Clerk of this Court.

<sup>2</sup> In its case (No. 89-1315), Amicus has raised, *inter alia*, the issue of absence of notice of the offenses for which punitive damages may be authorized, a threshold issue which may not be reached in the instant case.

which the amounts of punitive damages are to be determined.<sup>3</sup>

The collective wisdom of most legislative bodies, both state and federal, when enacting punitive damages statutes, is that the particular conduct warranting awards of punitive damages should be specified and that limits should be imposed thereon, such limits most often being treble damages or "up to" treble damages. Moreover, the legislative trend is to require proof by "clear and convincing" evidence.

In the absence of such statutes, the notice and other rights guaranteed by the Constitution (*e.g.*, the prohibition on double jeopardy) can be protected by allowing punitive damages only when the defendant's act constituted a crime by the defendant against the plaintiff in the jurisdiction in which the act was committed.

Amicus therefore seeks a ruling by this Court that, in the absence of a statute (i) identifying the specific acts for which punitive damages may be allowed and (ii) providing a standard by which they are to be measured, an award of punitive damages to a private plaintiff in a civil suit violates the defendant's right to due process and equal protection of the law unless it is shown by clear and convincing evidence that the act constituted a crime by the defendant against the plaintiff in the jurisdiction in which it was committed. Amicus also seeks a ruling that, in the absence of such a statute, awards of punitive damages in excess of twice the amount of actual damages (that is, awards in excess of treble damages) are standardless and excessive and violate the defendant's right to due process and equal protection of the law.

<sup>3</sup> Although Georgia has a statute authorizing punitive damages in tort cases, O.C.G.A. § 51-12-5, that statute does not specify with particularity the conduct for which punitive damages may be awarded, or limit the amounts thereof.

## ARGUMENT

### I. THE ASSESSMENT OF PUNITIVE DAMAGES VIOLATES DUE PROCESS.

As set forth in the Amicus' Petition for Writ of Certiorari in *The Hospital Authority of Gwinnett County, Georgia, v. R. Stanford Jones, supra*, No. 89-1315 (pp. 16-17), the standardless discretion of a jury to (1) award punitive damages in civil cases, and (2) determine the amount of such punishment, violates the Due Process Clause in each of the following ways:<sup>4</sup>

(a) Because people (later to become defendants) can become liable for punitive damages without notice of the nature of the offenses for which they may be held liable for such damages;<sup>5</sup> and juries may assess punitive damages without guidance as to the nature of the offenses for which punitive damages may be awarded;<sup>6</sup>

<sup>4</sup> Damages and penalties imposed by state laws, including civil laws, may be invalid as deprivations of property without due process of law. *Missouri Pac. R. Co. v. Tucker*, 230 U.S. 340, 351 (1913); *Southwestern Tel. & Tel. Co. v. Danaher*, 238 U.S. 482, 491 (1915). See also *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971). In addition, the fifth amendment right against the taking of private property for public use without just compensation has been incorporated into the Fourteenth Amendment and is therefore applicable to the states. See *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 122 (1978). The fact that punitive damages are awarded to a civil litigant rather than to the state is of no significance to a defendant. Punitive damages, when properly allowed, serve a public purpose and hence the Fifth Amendment "public use" provision is satisfied. See *Southwestern Tel. & Tel. Co. v. Danaher, supra*.

<sup>5</sup> *Small Co. v. American Sugar Ref. Co.*, 267 U.S. 233, 238-239 (1925); *Giaccio v. Pennsylvania*, 382 U.S. 399, 402-404 (1966).

<sup>6</sup> *Giaccio v. Pennsylvania, supra*; see also *Musser v. Utah*, 333 U.S. 95, 97 (1948).

(b) Because punitive damages are awarded upon proof by a mere preponderance of the evidence, despite the punitive and at least quasi-criminal nature of such damages;<sup>7</sup>

(c) Because unlimited punitive damages may be awarded against the same persons in separate suits, and such persons are thereby in jeopardy of repeatedly paying punitive damages for the same conduct or offense;<sup>8</sup>

(d) Because juries are not provided an objective standard for calculating or determining the amount of punitive damages to be awarded, whether by reference to actual damages, the defendant's ability to pay, or otherwise;<sup>9</sup>

(e) Because there is no ascertainable, definitive or meaningful limit upon the amount of punitive damages to be awarded;<sup>10</sup> and

(f) Because punitive damages may be awarded without relationship to the public safety, health, or welfare sought

<sup>7</sup> *In Re: Winship*, 397 U.S. 358, 365-366 (1970); *Trop v. Dulles*, 356 U.S. 86, 94 (1958) ("If the statute imposes a disability for the purpose of punishment — that is, to reprimand the wrongdoer, to deter others, etc., it has been considered penal") *see also* *Woodby v. Immigration and Naturalization Serv.*, 385 U.S. 276, 284-286 (1966), and cases cited.

<sup>8</sup> *Benton v. Maryland*, 395 U.S. 784, 794-796 (1969); *Juzwin v. Amtorg Trading Corp.*, 718 F.Supp. 1233 (D. N.J. 1989), *rev'd* on other grounds, *Juzwin v. Asbestos Corp. Ltd.*, slip opinion filed Apr. 10, 1990 (3rd Cir. 1990); *Digital & Analog Design v. N. Supply Co.*, 540 N.E.2d 1358, 1366 (Ohio 1989); *see* *Globus v. Law Research Service, Inc.*, 418 F.2d 1276, 1285 (2d Cir. 1969), *cert den'd.*, 397 U.S. 913 (1969); *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 838-842 (2d Cir. 1967); *deHaas v. Empire Petroleum Co.*, 435 F.2d 1223, 1231 (10th Cir. 1970).

<sup>9</sup> *See* *United States v. Batchelder*, 442 U.S. 114, 123 (1979); *United States v. Evans*, 333 U.S. 483, 486 (1948).

<sup>10</sup> *See* *United States v. Batchelder*, *supra*; *United States v. Evans*, *supra*; *but see* *Standard Oil Co. v. Missouri*, 224 U.S. 270 (1912).

to be served by the allowance of punitive damages, to wit: deterrence of intentional injuries; i.e., excessive punitive damages constitute "overkill" ("overdeterrence"), far beyond the states' police power requirements.<sup>11</sup>

Leaving explication of these due process defects to *Pacific Mutual*, *Amicus* will not dwell on them. Instead, we will proceed to the equal protection problems inherent in punitive damages.

## II. THE ASSESSMENT OF PUNITIVE DAMAGES DENIES EQUAL PROTECTION.

The aim of punitive damages, like the aim of the criminal law, is "to punish reprehensible conduct and to deter its future occurrence." *Bankers Life and Casualty Co. v. Crenshaw*, 486 U.S. 71, 87 (1988). Punitive damages are also akin to criminal fines, in that such damages are "private fines levied by civil juries . . ." *Gertz v. Robert Welch, Inc.*, *supra*, 418 U.S. 323, 350 (1974).

There can be very little argument that the nature of punitive damages is penal, and this Court's cases abound with this recognition. *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 109 S.Ct. 2909, 2932, 106 L.Ed. 2d 209 (1989). Punitive damages, in other words, " . . . serve the same function as criminal penalties . . ." *Rosenblum v. Metro Media, Inc.*, 403 U.S. 29, 82 (1971) (Marshall, J., dissenting) *overruled on other grounds*, *Gertz v. Robert Welch, Inc.*, *supra*. As the Chief Justice noted in his dissenting opinion in *Smith v. Wade*, 461 U.S. 30, 59 (1993) (Rehnquist, J., dissenting), punitive damages are "quasi-criminal" sanctions, but their imposition is "unaccompanied by the types of safeguards present in criminal proceedings." Thus, punitive damages partake of the elements that, in a purely criminal law context, would

<sup>11</sup> *Chicago & N.W. Ry. Co. v. NYE-Schneider-Fowler Co.*, 260 U.S. 35, 44 (1922); *see deHaas v. Empire Petroleum Co.*, *supra* n.8.



invoke the safeguards of other fundamental constitutional rights.

Distinctions drawn among the different classes (set forth below) subject to punitive damages ought to be afforded greater scrutiny than merely the "rational basis test." Punitive damages not only punish, they stigmatize. Cf., *Santosky v. Kramer*, 455 U.S. 745, 756 (1982). In their essential nature, punitive damages touch upon interests that, in the criminal law context or if undertaken directly by the state, would be protected as fundamental. As with the case of quasi-criminal ordinances examined for compliance with vagueness standards, *Village of Hoffman Estates v. Flip Side, Hoffman Estates, Inc.*, 455 U.S. 489, 498-500 (1982), such discriminations in the application of punitive damages should also warrant a relatively strict test under the equal protection clause.

Even when tested under the Court's most deferential standard of review, the "rational basis test," the laws governing punitive damages are undisputedly subject to challenge if such laws result in arbitrary or irrational discrimination. *Bankers Life and Casualty Co. v. Crenshaw*, *supra*, 486 U.S. at 71. Amicus submits that the states have created arbitrary and capricious classifications under Alabama and other state laws (including Georgia) relating to the application and effect of punitive damages. Such classifications violate the equal protection clause.

Punitive damages are arbitrary and capricious, as compared to the rights of criminal defendants subject to fines, because they provide drastically fewer protections for private litigants in tort suits than the criminal law provides to persons accused of crimes and subject to fines.<sup>12</sup> Before criminal fines may be imposed, a defendant is ensured of advance notice of the nature of the offenses for

<sup>12</sup> A criminal defendant subject to a fine is entitled to the same constitutional protections as other criminal defendants. See *Mayer v. City of Chicago*, 404 U.S. 189, 196-197 (1971).

which he may be punished and the consequent certainty that judges and juries will be informed of the nature of the offenses for which such fines may be imposed. *Musser v. Utah*, *supra*, 333 U.S. at 97. Not so for defendants in civil cases liable for "private fines," as punitive damages have aptly been described. See *Gertz*, *supra*, 418 U.S. at 350.

Defendants in criminal cases subject to fines have the protection of a statutory limitation upon the amount of fine which may be imposed, and protection against double jeopardy. Moreover, persons charged with crimes may not be convicted unless they are found guilty beyond a reasonable doubt, an important and fundamental protection of the individual against punitive action, and a substantially higher burden of proof than a mere preponderance of the evidence. *In Re: Winship*, 397 U.S. 358, 364 (1970). Civil defendants subject to punitive damage awards are denied these, and other, fundamental protections afforded defendants subject to criminal fines. The denial of these safeguards permits "overkill" ("overdeterrence"), is not rationally related to a legitimate state interest (punishment or deterrence), and is, accordingly, offensive to the Constitution. See *Lindsey v. Normet*, 405 U.S. 56, 76-77 (1972).

The imposition of punitive damages is also arbitrary and capricious when compared to other civil defendants protected by special punitive damage statutes, as provided for in Alabama<sup>13</sup> and other states.<sup>14</sup> Allowing open-ended, unlimited punitive damages against some defend-

<sup>13</sup> See Code of Alabama § 5-19-19 (1981) (double damages or ten times any excess interest charged); § 6-6-314 (1977) (double damages for unlawful detainer); § 8-19-10(a)(2) (1984) (treble damages for some deceptive trade practices); § 8-19-5(19), (20) (1984) (treble damages for other deceptive trade practices); § 37-2-18 (1977) (treble damages for excessive rates by common carriers).

<sup>14</sup> Citations to such statutes under California law are contained in Appendix 7 to Petitioner's Reply Brief on Petition for Certiorari herein.

ants, while limiting the punitive damages possible for other conduct specified by statute, is arbitrary when considered in light of the complete lack of safeguards and standards for the protection of civil defendants not subject to a special statute.

Whereas civil defendants in Alabama or Georgia may be subjected to unlimited discretion in the awarding of punitive damages in tort cases generally, other civil defendants, charged with usury, unlawful detainer, deceptive trade practice, and excessive rate making, for example, are singled out for a limitation in their exposure. Where "moral discretion" (as in Alabama), or "the enlightened conscience of the jury" (as in Georgia), is the only limitation on the amount of punitive damages, there can be no rational basis for protecting some defendants guilty of certain specified classes of conduct, by limiting damages to specific amounts or percentages, or to double or treble damages, and leaving other civil defendants, such as Pacific Mutual and Amicus, unprotected. There is no rational way to reconcile these distinctions. Important and fundamental constitutional rights are involved which warrant protection.

This Court has protected against the risk of arbitrary and capricious action in the area of criminal punishment by requiring a jury's discretion to be suitably directed and limited. Although the death penalty is not comparable to punitive damages, as such, this Court's cases dealing with the death penalty demonstrate, by analogy, a step in the right direction for controlling the imposition of punitive damages. As should be required with punitive damages, in the death penalty cases, this Court has required that a jury's discretion be controlled by clear and objective standards to produce nondiscriminatory application of the law. See *Gregg v. Georgia*, 428 U.S. 153, 198 (1976).

In the death penalty cases, this Court has prescribed procedures for adequate information, guidelines, and standards under which discretion must be exercised by

the authority imposing the punishment. See *McCleskey v. Kemp*, 481 U.S. 279, 302 (1987); *Eddings v. Oklahoma*, 455 U.S. 104, 111 (1982). Failure to so provide as to punitive damages produces arbitrary results discriminatory to those unprotected by due process safeguards and by statutory limits imposed by state law.<sup>15</sup>

By analogy, punitive damages threaten a financial death to both corporations and individuals. Such a threat warrants constitutional protection. Just as the sentence of death cannot be imposed without proper standards and direction, neither should punitive damages be allowed to be imposed without standards to assure fairness of treatment and equal protection of the laws. The treatment of the death penalty suggests a proper framework for securing the goals of consistent application and fairness in the imposition of punitive damages. See *Eddings v. Oklahoma*, *supra*, 455 U.S. at 875.

In addition, this Court has recognized that criminal defendants are entitled to fundamental fairness and equality throughout the criminal justice system. *Griffin v. Illinois*, 351 U.S. 12, 18-21 (1956); *Mayer v. City of Chicago*, *supra*, 404 U.S. at 197-98; *Burns v. Ohio*, 360 U.S. 252, 257-58 (1959); *Smith v. Bennett*, 365 U.S. 708, 714 (1961). In all of these cases, this Court recognized the

<sup>15</sup> Although the death penalty cases were decided under the Eighth Amendment, concepts of fairness, due process, and equal protection were not disregarded in the analysis. See *Eddings v. Oklahoma*, 455 U.S. 104, 111 (1982) ("Beginning with [*Furman v. Georgia*, 408 U.S. 238 (1972)], the Court has attempted to provide standards for a constitutional death penalty that would serve both goals of measured, consistent application and fairness to the accused."); *Gregg v. Georgia*, 428 U.S. 153, 189 (1976) ("[W]here discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."); *McCleskey v. Kemp*, 481 U.S. 279, 302 (1987) (quoting *Coley v. State*, 231 Ga. 829, 834, 204 S.E.2d 612, 615 (1974)) (Death penalty statute is constitutional as long as procedures ensure that any jury discretion "is controlled by clear and objective standards so as to produce non-discriminatory application.").

invidious, arbitrary, and capricious discrimination against indigent criminal defendants as violative of the equal protection clause. The essence of the violation was a denial of fundamental fairness in the proceedings, as is the case with punitive damages.

In Alabama, and Georgia as well, where the damages awardable are discretionary, where damages are not required to be proportional, where there is no limitation upon the amounts that may be awarded, such open-ended liability is arbitrary and capricious and bears no rational relationship to any appropriate state interest. This result obtains whether the treatment of punitive damages defendants in civil cases is compared to criminal defendants subject to fines, or to civil defendants subject to limited punitive statutes under other specific enactments. Whereas punitive damages defendants may, without notice, have open-ended "civil fines" imposed based upon a preponderance of the evidence, criminal defendants' crimes are defined and the fines are limited and may only be imposed upon satisfaction of a higher burden of proof.

This Court has recognized the arbitrary and capricious nature of punitive damage awards. *See Gertz v. Robert Welch, Inc., supra*, 418 U.S. at 350 ("juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused"); *Electrical Workers v. Foust*, 442 U.S. 42, 51, n.14 (1979) (quoting *Gertz, supra*); *Bankers Life and Casualty Co. v. Crenshaw, supra*, 486 U.S. at 87 (the "impact of these windfall recoveries is not predictable and potentially substantial") (O'Connor, J., concurring); *Browning-Ferris Industries v. Kelco Disposal, Inc., supra*, 109 S.Ct. at 2932 ("A governmental entity can abuse its powers by allowing civil juries to impose ruinous damages as a way of furthering . . . the criminal law.") (O'Connor, J., concurring); *Smith v. Wade, supra*, 461 U.S. at 59 ("punitive damages are frequently based upon the caprice and prejudice of ju-

rors") (Rehnquist, J., dissenting). It is the arbitrary and capricious nature of these damages when compared to defendants singled out for particular legislation, both criminal and civil, that renders punitive damages unconstitutional under the Equal Protection Clause.

Accordingly, the fines imposed as punitive damages in civil cases under Alabama and Georgia law deprive civil defendants of equal protection of the law by denying such defendants the protections, direction, and limitations afforded to other civil defendants and criminal defendants subject to fines. The laws in issue should also be declared unconstitutional as a violation of equal protection.

### III. A PROPOSED SOLUTION.

In this section Amicus will undertake to set forth the current status of the laws relating to punitive damages and, based thereon, to recommend a solution which satisfies the requirements of both the Due Process and Equal Protection Clauses of the Constitution.

According to a recent survey of state law, L. Schlueter and K. Redden, 2 *Punitive Damages* (2d Ed. 1989) (pp. 168-270), punitive damages are allowed in 48 states. They are generally disallowed in the other two states, Nebraska (*Id.* 228), and New Hampshire (*Id.* 230).<sup>16</sup>

Although there is some variance in the words used in the 48 states allowing punitive damages, the almost universal purpose of punitive damages as expressed by the courts, and in some instances by the state legislatures, is to punish the defendant and to deter the defendant and

<sup>16</sup> The Nebraska court has held that statutes authorizing punitive damages are prohibited by the state constitution's due process clause (*Id.* 228). However, Schlueter and Redden list four Nebraska statutes authorizing double or treble damages (*Id.* 228-229).



others from similar misconduct.<sup>17</sup> As this Court noted in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, *supra*, 109 S.Ct. at 2920: "... punitive damages advance the interest of punishment and deterrence, which are also among the interests advanced by the criminal law ...."

Based upon their study, Schlueter and Redden reached the following conclusion:

... [I]t has been a well-settled doctrine in this country for over a century that punitive damages are non-compensatory in character. The availability of actual damages in tort for mental anguish, wounded feelings, indignity and embarrassment have made the awarding of punitive damages on such basis redundant. In fact, the decisional law of only three states has assigned to punitive damages a compensatory function. (Footnotes omitted.)

1 L. Schlueter and K. Redden, *Punitive Damages* (2d Ed. 1989) p. 17.

This Court has recognized that "[p]unitive damages are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence." *Electrical Workers v. Foust*, *supra*, 442 U.S. at 48, quoting *Gertz v. Robert Welch, Inc.*, *supra*, 418 U.S. at 350. Citing *Gertz*, the Fourth Circuit Court of Appeals has found: "Thus, the compensatory function of punitive damages has become vestigial." *Shamblin's Ready Mix, Inc. v. Eaton Corp.*, 873 F.2d 736, 742 (4th Cir. 1989). Therefore, the purpose of punitive damages today almost invariably is to punish a person for

<sup>17</sup> Punitive damages are sometimes called "exemplary damages" because their purpose is to punish the defendant and make an example of him, so as to deter others from similar misconduct.

outrageous conduct, and deter him and others from similar conduct in the future, Restatement (Second) of Torts § 908(1) (1979), and thereby to promote public safety.

That punitive damages have as their purpose promoting public safety by punishing the defendant and deterring him and others, gives rise to the correlative propositions that the conduct which gives rise to punitive damages should be recognizable in advance and that the amount of punitive damages should be adequate to serve the public purpose, but should not be excessive and hence constitute an "overdeterrence." For example, some businesses fearing excessive punitive damage awards are reputed to have adopted policies prohibiting their employees from causing shoplifters to be arrested, and passing those losses onto their paying customers. As Justice O'Connor has noted: "Some manufacturers of prescription drugs ... have decided that it is better to avoid uncertain liability than to introduce a new pill or vaccine into the market." O'Connor, J., concurring in part in *Browning-Ferris Industries v. Kelco Disposal, Inc.*, *supra*, 109 S.Ct. at 2924.

The fear, by itself, of excessive punitive damage awards should not be allowed to "overdeter" the arrest of shoplifters and the production of new and beneficial medicines. As observed by Schlueter and Redden, in recent years courts and legislatures have become concerned about punitive damages and have, *inter alia*, taken the position that "... punitive damages should not be imposed if such an award would impede, rather than promote, the public good ..." 1 L. Schlueter and K. Redden, *Punitive Damages*, 23.

How have the legislatures treated punitive damages? According to Schlueter and Redden, *supra*, Vol. 2 at 204, Massachusetts does not allow punitive damage awards absent statutory authority. Therefore, it is interesting to note that in Massachusetts, where its legislature has



enacted numerous statutes authorizing punitive damages to deter particularized conduct, in only five statutes listed by Schlueter and Redden did the Massachusetts legislature fail to limit punitive damages awards to either double or treble the actual damages (*Id.* 204-208).<sup>18</sup>

In the State of Washington, its Supreme Court has held that, in the absence of statutory authorization, punitive damages are not authorized on public policy grounds because the doctrine is "unsound in principle, unfair, and dangerous in practice" (*Id.* 266). In enacting punitive damages statutes the Washington legislature, has, with only one exception, provided limits on the amount of such awards and, again with only one exception, has limited punitive damages to double or treble damages (*Id.* 266-267).

Similarly, the general rule in Louisiana is that punitive damages will not be allowed unless expressly authorized by statute (*Id.* 199-200), and statutes enacted by the Louisiana legislature authorizing punitive damages for specified misconduct almost invariably contain a dollar or percentage limit, or provide for treble damages (*Id.* 200-201).

The California legislature also has been active in enacting statutes authorizing punitive damages for specified misconduct, and in a majority of that legislation punitive damages are limited to double or treble damages (*Id.* 173-178).

In fact, according to the statutes listed by Schlueter and Redden (*Id.* 168-270), when state legislators consider the subject of punitive damages they more often

<sup>18</sup> "Treble damages" consist of two elements: First, actual damages, and, second, punitive damages in twice the amount of actual damages. "Double damages" provide for recovery of punitive damages in an amount equal to actual damages.

than not limit such awards to double or treble damages, or "up to" double or treble damages.

In eight states, Connecticut (*Id.* 180 — 181), Delaware (*Id.* 182-183), Illinois (*Id.* 190-193), Missouri (*Id.* 220-223), New Hampshire (*Id.* 230-231), Pennsylvania (*Id.* 248-249), South Carolina (*Id.* 252-255), and Texas (*Id.* 259-262), their legislatures have allowed, in a few statutes, more than treble damages, the most common multiplier in those eight states (other than double or treble) being "5 times," or "up to 5 times," actual damages.<sup>19</sup>

The reference to the foregoing eight states, which have some statutes which allow more than treble damages, should not overshadow the fact that the forty-seven state legislatures which have enacted punitive damages laws most often limit them to double or treble damages, or "up to" those amounts.<sup>20</sup> 2 L. Schlueter and K. Redden, *Punitive Damages*, pp. 168-270.

Like the states, when expressly providing for the allowance of punitive damages, Congress has provided for treble damages, or "up to" treble damages, in some statutes,<sup>21</sup> has provided for double damages in some

<sup>19</sup> The only state which has a statute which allows more than "5 times" apparently is Illinois, which allows the administrator of its toxic substances act to award punitive damages not to exceed ten times the total monetary amount owed by violators of the act, or \$20,000, whichever is larger (*Id.* 191).

<sup>20</sup> Of the three remaining states, as mentioned above Delaware has a "5 times" law (*Id.* 182), New Mexico has no punitive damages statutes (*Id.* 234), and Wyoming has only one punitive damages statute (*Id.* 270).

<sup>21</sup> Agricultural Adjustment Acts, 7 U.S.C. § 1380n (1970); the anti-trust laws, Clayton Act of 1914, § 4, 15 U.S.C. § 15 (1982); Bank Holding Company Act, 12 U.S.C. § 1975 (1982); Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1964(e) (1970); Patent Infringement, 35 U.S.C. § 284 (1970); Plant Variety

statutes,<sup>22</sup> and has provided specific limits in other statutes.<sup>23</sup>

Thus, when enacting punitive damages statutes, the collective wisdom of most legislative bodies is that punitive damages may be appropriate for specified misconduct but that limits should be placed thereon and we submit that, at least in the absence of a statute, those limits should be no more than "up to" treble damages.<sup>24</sup> Let the juries remain free to determine the amount of punitive damages for particularized misconduct, but within specified limits.

According to Schlueter and Redden, Punitive Damages, *supra*, in addition to limiting punitive damages, some states now require a higher burden of proof than the preponderance of the evidence: Arizona (clear and convincing, 1986, *Id.* 170); Colorado (beyond a reasonable doubt, 1973, *Id.* 179); Minnesota (clear and convincing, 1988, *Id.* 212); North Dakota (clear and convincing, 1987, *Id.* 239); Ohio (clear and convincing, 1987, *Id.* 241);

Act, 7 U.S.C. 2564 (1982); Prevention of Unfair Methods of Competition in Import Trade, 15 U.S.C. § 72 (1982); and Trademark Infringement, 15 U.S.C. § 1117 (1970).

<sup>22</sup> Agricultural Adjustment Acts, 7 U.S.C. § 1642(d) (1982); False Claims Against the Government, 31 U.S.C. § 231 (1970); Federal Property and Administrative Services Act of 1949, 40 U.S.C. § 489(b)(1) (1982); and Truth in Lending Act, 15 U.S.C. § 1640(a)(2)(A) (1982).

<sup>23</sup> Agricultural Adjustment Acts, e.g. 7 U.S.C. § 1346(a) (1982); Consumer Credit Protection Act, 15 U.S.C. §§ 1692K(a)(1), 1692K(a)(2)(A), 1692K(a)(2)(B) (1982); Equal Credit Opportunity Act, 15 U.S.C. § 1691e(b) (1982); Fair Housing Act (Civil Rights Act of 1968), 42 U.S.C. § 3612(e) (1982); Federal National Mortgage Association Charter Act, 12 U.S.C. § 1723a(e) (1982); and Rail Reorganization Act, 45 U.S.C. § 711(j) (1982).

<sup>24</sup> "Awards of double or treble damages authorized by statute date back to the 13th century . . ." *Browning-Ferris Industries v. Kelen Disposal, Inc.*, *supra*, 109 S.Ct. at 2919.

Oklahoma (clear and convincing, 1987, *Id.* 243); and Oregon (clear and convincing, 1987, *Id.* 246). To this list, at least Alabama and Georgia now can be added. Code of Alabama § 6-11-20 (1989) (clear and convincing); Official Code of Georgia Annotated § 51-12-5.1 (1987) (clear and convincing; effective for causes of action arising after June 30, 1987).

In view of the foregoing, we respectfully submit that in the absence of a statute providing notice of, and identifying for judges and juries, the specific acts for which punitive damages may be allowed, due process and equal protection prohibit punitive damages unless the defendant's act was shown by clear and convincing evidence to have been an act which constituted a crime by the defendant against the plaintiff in the jurisdiction in which it was committed. By tying punitive damages to criminal acts by the defendant against the plaintiff, the lack of notice, absence of standards to guide judges and juries, and the multiple jeopardy problems are solved. In fact, the criminal law may be the only solution to the requirement of notice. Moreover, if the defendant's act does not constitute a crime, then the jury should not be allowed, in its sole discretion, to take punitive action on an *ad hoc* basis.<sup>25</sup>

We also respectfully submit that, in the absence of a statute providing a means for determining the amount of punitive damages, due process and equal protection prohibit punitive damages in excess of treble damages, by far the most common multiplier used by Congress and most state legislatures enacting punitive damages laws. The allowance of punitive damages, not to exceed twice the plaintiff's actual damages, would provide limitations on the amount of punitive damages based upon the severity

<sup>25</sup> Unless prohibited by statute, a liability insurance company could, if it saw fit to do so, include in its policies an exclusion for crimes, and thus the burden of punitive damages would fall not on the insurance company, to be passed on to its policyholders, but upon the criminal actor individually.

of the injury or damage caused by the defendant, and would protect the states' interests in public safety, health and welfare without "overdeterrence" beyond the states' police power requirements. In those cases in which the act was shown by clear and convincing evidence to be a crime by the defendant against the plaintiff, the jury could ascertain the actual damages and award a separate amount as punitive damages, in a total amount not to exceed treble damages.<sup>26</sup>

We respectfully submit that, in the absence of a specific statute, a holding such as that described above would solve most, if not all, of the due process and equal protection issues raised in this case.

The judgment and decision of the court below should be reversed for failing to so hold. (Similarly, the decision of the Supreme Court of Georgia in No. 89-1315 should be reversed because, although Georgia has a punitive damages statute, O.C.G.A. § 51-12-5, it fails to specify the conduct authorizing punitive damages with sufficient particularity to satisfy the requirements of due process and equal protection. That "entire want of care which would raise the presumption of a conscious indifference to the consequences" is too vague. There is nothing in these few words that implies any inherent restraint on the arbitrary and capricious infliction of punitive damages. *Cf., Godfrey v. Georgia*, 446 U.S. 420, 428 (1980)).

<sup>26</sup> If a legislature in adopting a statute saw fit to allow treble or even higher damages for expressly described acts which do, or do not, constitute crimes, each of those expressly described acts could be evaluated by the state courts to determine whether the legislature was justified in allowing punitive damages for such specified acts, and allowing damages in amounts greater than authorized by the requirements of due process and equal protection applicable to punitive damages generally.

## CONCLUSION

For the reasons set forth above the decision of the court below should be reversed for failure to afford litigants due process and equal protection.

June 1, 1990

Respectfully submitted,

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